Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES

October Term, 2000

NOEMI A. COLLIE,

Petitioner

vs.

JOE KENDALL, U. S. District Judge
JERRY L. BUCHMEYER, Chief District Judge,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Is the deprivation of constitutional due process in the form of notice and opportunity to be heard merely acting "in excess" of a court's jurisdiction, or is constitutional due process a jurisdictional prerequisite, the deprivation of which causes the court to act in the "clear absence of all jurisdiction," or causes the court to lose "all jurisdiction," including any subject matter jurisdiction it might have otherwise held?

II.

Are the Supreme Court's holdings in Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978) and Ruhrgas v. Marathon Oil Company, 526 U.S. 574, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999) in conflict with one another as regards the importance of personal jurisdiction in determining whether a court has acted in the "clear absence of jurisdiction?"

III.

Does the holding in Stump v. Sparkman, as well as, those of its predecessors and progeny, improperly attribute a fundamental hierarchical importance to subject matter jurisdiction over personal jurisdiction in its judicial immunity analysis of when a court acts in the "clear absence of all jurisdiction" and in so doing do these courts improperly expand that jurisdiction authorized by the Constitution of the United States?"

IV.

Is the disbarment of an attorney from an entire district a judicial act or an administrative act authorized by the court's inherent powers?

V.

Whether federal judges who are named as defendants in Bivens actions enjoy absolute immunity against claims seeking injunctive and declaratory relief?

VI.

Is the making in good faith of an argument for the extension, modification, or reversal of existing law or the establishment of new law which is in fact supported by dissenting opinions, scholarly articles, and a logical argument supported by law and reason, frivolous and sanctionable conduct under Fed. R. Civ. P. 11, merely by virtue of the majority having in the past consistently taken an opposite view?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Frank P. Hernandez, was also a party before the Fifth Circuit Court of Appeals.

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Petitioners, Noemi A. Collie (hereinafter "Collie") and Frank P. Hernandez (hereinafter "Hernandez"), respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit entered in Collie v. Kendall, etal., Consolidated App. Nos. 99-10722 and No. 99-11025 (5th Cir. 2000) is not published. (App. A). The opinions of the United States District Court for the Northern District of Texas in Collie v. Kendall, etal., Civ. No. 3:98-CV-1678-G (Dallas Division, May 19, 1999, July 6, 1999, and August 24, 1999) are not published. (App. B, C, and D).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit ("Court of Appeals") was entered on June 9, 2000. No Petition for Reconsideration was filed. (App. A).

Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND COMMON LAW PROVISIONS BELOW

The Fifth Amendment of the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . "

The Fourteenth Amendment of the United States Constitution provides in relevant part: "No State shall make

or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law. . ."

The common law doctrine of judicial immunity states: a judge is immune from suits for damages for all "judicial acts" that are not performed in the "clear absence of all jurisdiction." See Mireles v. Waco, 502 U.S. 9, 11-12 (1991); Mays v. Sudderth, 97 F.3d 107, 111 (5th Cir. 1996); Malina v. Gonzalez, 994 F.2d 1121, 1124 (5th Cir. 1993).

STATEMENT OF THE CASE

This case arises out of a claim against United States District Court Judges Joe Kendall (hereinafter "Kendall") and Jerry Buchmeyer (hereinafter "Buchmeyer") for damages, prospective injunctive relief, declaratory relief, and attorney's fees pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) as a result of the deprivation of Collie's constitutional due process rights during the imposition of a now reversed and vacated disbarment from the United States District Court for the Northern District of Texas.[1]

The fundamental question in this case is whether the application of the judicial immunity doctrine to instances of alleged knowing, malicious, corrupt and/or discriminatory violations of due process has been based on an artificial and improper attribution of superior importance to subject matter jurisdiction over personal jurisdiction when in fact the lack of either equally deprives a court of all jurisdiction. Flowing from this question is whether the knowing deprivation of basic constitutional due process is merely acting "in excess" of one's subject matter jurisdiction or whether such acts actually deprive a court of its subject matter jurisdiction.

[1] See Dailey v. Vought Aircraft Company, 141 F.3d 224 (5th Cir. 1998)(describing finding disbarment should be reversed and vacated due to failure to provide notice or an opportunity to be heard prior to disbarment).

Also at issue is the question of whether the disbarment of an attorney is a "judicial act" or merely an administrative act which could be equally carried out by a non-judge.

Finally, as Petitioner, Collie, and her attorney of record, Hernandez, also a Petitioner herein, were sanctioned for bringing the arguments set forth above, the question arises whether the making in good faith of an argument for the extension, modification, or reversal of existing law or the establishment of new law which is in fact supported by dissenting opinions, scholarly articles, and a logical argument supported by law and reason, frivolous and sanctionable conduct under Fed. R. Civ. P. 11, merely by virtue of the majority having in the past consistently taken an opposite view. Or in short, have Petitioners been sanctioned merely for taking an unpopular position?

A. Course of Proceedings in District Court:

On July 20, 1998, Collie filed her Original Complaint and Jury Demand against Kendall and Buchmeyer. In said Complaint Collie sought to recover both legal and equitable relief from Kendall and Buchmeyer for the alleged intentional, knowing, malicious and/or discriminatory violation of her constitutional due process rights arising out of a failure to provide her notice and an opportunity to be heard prior to her disbarment over an alleged willful failure to pay an $8,500.00 sanction previously imposed by Kendall. Collie filed her complaint as *pro se* co-counsel with her attorney of record, Hernandez.

Collie alleged the following facts in her Complaint:

1. Collie's disbarment by Kendall for the alleged

willful failure to pay Rule 11 sanctions deprived Collie of her constitutional rights to due process because Collie was not afforded notice or an opportunity to be heard prior to her disbarment.[2]

2. Buchmeyer's refusal to correct Kendall's violation of Collie's due process rights by setting aside Kendall's void order, and his own failure to provide Collie an adequate opportunity to be heard, also violated Collie's constitutional due process rights.[3]

3. Such deprivations were knowingly in violation of her constitutional rights to due process, intentional, discriminatory and malicious.

4. Kendall and Buchmeyer have shown bias towards her in subsequent cases since her disbarment and this Court's revocation of the same.

6. The acts she complained of were either not judicial in nature, that is, they were administrative acts, or were taken in the clear absence of all jurisdiction.

7. Collie sought monetary damages for the injury to her practice and reputation within the legal community, declaratory relief, equitable and prospective injunctive relief in the form of an order preventing them from sitting on any of her cases in the future, and attorney's fees against Kendall and Buchmeyer.

The case was randomly assigned to United States District Judge A. Joe Fish (hereinafter "Judge Fish"). On July 27, 1998, Judge Fish issued an order instructing Collie that Hernandez was suspended from practicing before his court, and that she would either have to obtain other counsel or

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[2] See fn. 1.

[3] See fn. 1.

prepare to act *pro se*.[4] Collie continued *pro se* knowing it would be impossible for political, legal and financial reasons to retain other counsel in Dallas, Texas.

On September 18, 1998 Kendall and Buchmeyer filed their Motion to Dismiss and Brief in Support Thereof. Therein they argued pursuant to Rule 12(b)(6) that Collie could prove no set of facts which would entitle her to relief in that her claims were legally insufficient due to the application of the doctrine of judicial immunity. They also filed their Motion for Rule 11 Sanctions and Brief in Support Thereof on September 18, 1998.

On October 8, 1998, Collie filed, *pro se*, her Response to Defendants' Motion to Dismiss and Motion for Sanctions and Brief in Support Thereof.

On October 23, 1998, Kendall and Buchmeyer filed their Reply to Plaintiff's Response to Defendants' Motion to Dismiss and Motion for Sanctions.

On May 19, 1999, Judge Fish entered an order giving Hernandez permission to file a response to Defendants' Motion for Sanctions with the court which had been filed against both Collie and Hernandez. Also on May 19, 1998, Judge Fish entered a Memorandum Order granting Defendants' Motion to Dismiss on the grounds that Collie could not state a claim upon which relief could be granted because Kendall and Buchmeyer were entitled to judicial immunity. (App. B). Judgment was entered on May 19, 1999.

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[4] Although this order was also entered without any notice or opportunity to be heard it was upheld by the Fifth Circuit without explanation in an unpublished opinion (App. E) and although a Petition for Writ of Certiorari was also filed it was denied. See also, Sup. Ct. No. 98-1073, *Clayton Bryant Caves v. Officer Mark Lockridge, In Re Frank P. Hernandez*, 12-31-98, *writ denied*.

On June 10, 1999, Hernandez filed his response to the Defendants' Motion for Sanctions.

On June 18, 1999, Collie filed her Notice of Appeal from the dismissal of her case.

On July 6, 1999, Judge Fish entered a Memorandum Order granting Defendants' Motion for Sanctions. (App. C).

On August 24, 1999, Judge Fish entered an Order imposing $2,777.11 in sanctions against Collie and Hernandez jointly and severally. (App. D).

On September 8, 1999, Collie and Hernandez filed a Notice of Appeal from the Orders granting sanctions.

B. Course of Proceedings before the Fifth Circuit:

On June 9, 2000 the Court of Appeals for the Fifth Circuit issued pursuant to its Summary Calendar an unpublished opinion affirming the district court's dismissal of Collie's claims, as well as, the imposition of sanctions. (App. A).

In this opinion the Court of Appeals merely reiterated law which Collie and Hernandez were arguing should be changed or interpreted differently, it made no attempt to discuss or argue against the specific points in support of such a change made by Collie and Hernandez on appeal.

Additionally, although the District Court had dismissed Collie's claims of prospective injunctive relief and attorneys fees despite this Court's ruling in Pulliam v. Allen, 466 U.S. 522 (1984), finding Pulliam inapplicable, the Court of Appeals determined it need not reach the issue of whether

Pulliam allowed for injunctive relief under Bivens since it found the injunctive relief sought by Collie to have been frivolous and ridiculous.

Although the Court of Appeals did not sanction Collie or Hernandez for bringing their appeal, it did threaten that should any further "frivolous" appeals, including petitions for rehearing be filed, sanctions would be imposed.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE MAJORITY'S OPINION, INCLUDING THAT OF THIS COURT, AS TO WHAT IT MEANS TO ACT IN THE "CLEAR ABSENCE OF ALL JURISDICTION" IS IN CONFLICT WITH THIS COURT'S RULINGS ON THE ESSENTIALNESS TO A COURT'S JURISDICTION OF BOTH SUBJECT MATTER JURISDICTION AND PERSONAL JURISDICTION; WITHOUT ONE THERE IS NEITHER.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE MAJORITY'S OPINION, INCLUDING THAT OF THIS COURT, THAT THE KNOWING OR MALICIOUS VIOLATION OF A LITIGANT'S CONSTITUTIONAL DUE PROCESS RIGHT TO NOTICE AND AN OPPORTUNITY TO BE HEARD IS BARRED BY JUDICIAL IMMUNITY, IS REPEATEDLY BASED ON THE MISTAKEN ASSERTION THAT SUCH A VIOLATION IS MERELY A "PROCEDURAL ERROR" RATHER THAN AS THIS COURT HAS HELD

IT TO BE IN EVERY OTHER SET OF CIRCUMSTANCES; A SUBSTANTIVE RIGHT THE VIOLATION OF WHICH DEPRIVES A COURT OF ALL JURISDICTION.

A. History of the Judicial Immunity Doctrine And the Due Process of Law:

Collie does not seek to abolish the doctrine of judicial immunity nor does she argue that Bivens, abolishes this doctrine. She concedes that for the purposes of protecting the independence of the judiciary, it is necessary to place some limit on its exposure to civil liability, and that this limitation has become known as the doctrine of judicial immunity. It is argued, however, that the doctrine was never intended to be absolute in its effect. By its very definition, there are exceptions to the rule. More specifically, a judge is not immune from liability for nonjudicial actions, that is, actions not taken in the judge's judicial capacity, and for actions, though judicial in nature, taken in the complete absence of all jurisdiction. See e.g., Forrester v. White, 484 U.S. 219, 223-230, 356-357 (1988)(a state-court judge does not have absolute immunity from a damages suit under Sec. 1983 for his decisions to demote and dismiss a court employee); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 352 (1871)(by way of example the court indicated in dicta that a probate judge who tried and convicted an individual for a criminal offense would have acted without jurisdiction because he did not have subject matter jurisdiction).

The concept that an intentional and malicious constitutional violation of due process in the form of the failure to provide notice and an opportunity to be heard is not a judicial act and/or will deprive a court of its jurisdiction, and that such an act would expose the offending judge to civil

liability, is not a new argument. The history of debate relating to this claimed exception to judicial immunity, can be traced with a review of a few major cases.

1. Randall v. Bingham:

In 1869 the Supreme Court considered a claim that judicial immunity did not apply because constitutional due process rights had allegedly been violated when an attorney was disbarred. Randall v. Bingham, 74 U.S. (7 Wall.) 523 (1868). In that case, the disbarred attorney brought suit alleging his constitutional rights had been violated because although he had received notice in the form of a letter, and an opportunity to be heard, he had not received a formal citation and charge prior to being removed from the rolls of the court. Id., at 539. The Supreme Court in Randall accepted the premise without question that the denial of notice and an opportunity to be heard would have deprived the court of jurisdiction and exposed him to civil liability so long as he had acted with malice or corruptly, but then decided against the attorney in that particular case finding that he had in fact received sufficient notice and an opportunity to be heard. Id., at 537-539.

2. Bradley v. Fisher:

Randall was later addressed and narrowed by the Supreme Court in Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871). In Bradley another attorney who had apparently been contemptuous in the presence of the court also complained the court had no jurisdiction when it removed him from the rolls of the court without any notice or opportunity to be heard. In this case, the Supreme Court determined ultimately that the court erred in failing to give notice and an opportunity to be heard, but determined that this was merely

an erroneous exercise of the court's jurisdiction, and that however it affected the validity of the act, it did not make the act any less judicial or as though the court had proceeded without having any jurisdiction. Id., at 356-357. In making said ruling the Supreme Court limited the doctrine of judicial immunity and its exception of "clear absence of all jurisdiction," to instances when a court acts without any subject-matter jurisdiction, and relegated all other failures to act with jurisdiction as acts merely in excess of the court's jurisdiction. Id. The Court stated:

Where there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgment may depend.

Id., at 352.

In a strong dissenting opinion Justice Davis, joined by Justice Clifford, came to the conclusion that when a court acts in excess of his jurisdiction, and does so maliciously or corruptly, the Judge should be held liable for his actions the same as a private person would be under these circumstances. See id., 356-357.

3. Pierson v. Ray:

In 1967 the Supreme Court again considered the judicial immunity doctrine while contemplating its application to a claim that constitutional rights had been violated under 42 U.S.C. Sec. 1983. Pierson v. Ray, 386 U.S. 547 (1967). While not going into the specific applications of the judicial immunity doctrine the Court appears to have concluded that the judge actions in this case were judicial and that he acted within his subject matter jurisdiction. It also determined that it was not Congress' intent to abolish the judicial immunity doctrine with the passing of 42 U.S.C. Sec. 1983 which allowed for suit over the violation of one's constitutional rights. Id., at 554.[5]

The Honorable Justice Douglas entered a dissenting opinion in Pierson complaining the Court had gone too far in attempting to protect the judiciary's independence. Id., at 558. He argued that it was clearly Congress' intent to include judges in the "every person" statement set forth in 42 U.S.C. Sec. 1983, and that it was in fact the conduct of unscrupulous judges that had in part brought about the passing of this statute. Id., at 560. Justice Douglas stated:

This is not to say that a judge who makes an honest mistake should be subjected to civil liability. It is necessary to exempt judges from liability for the consequences of their honest mistakes. . . . Imposing liability for mistaken, though honest judicial acts, would curb the independent mind and spirit needed to perform judicial functions. Thus, a judge who sustains a conviction on what he forthrightly considers adequate evidence should not be subjected to liability when

[5] Collie, who has brought her claim under Bivens, the judicially created equivalent to 42 U.S.C. Sec. 1983, does not attempt to argue that 42 U.S.C. Sec. 1983 or Bivens abolished the judicial immunity, however, she argues that a judge whose actions are non-judicial or taken without any jurisdiction, would be liable as any other person under these laws.

an appellate court decides that the evidence was not adequate. Nor should a judge who allows a conviction under what is later held an unconstitutional statute. . . . **But that is far different from saying that a judge shall be immune from the consequences of any of his judicial actions, and that he shall not be liable for the knowing and intentional deprivation of a person's civil rights**. . . . Congress, I think, concluded that the evils of allowing intentional, knowing deprivations of civil rights to go unredressed far outweighed the speculative inhibiting effects which might attend an inquiry into a judicial deprivation of civil rights. (emphasis added).

Id., at 566.

4. Stump v. Sparkman:

The Supreme Court next visited the issue of judicial immunity and due process of law in Stump v. Sparkman, 435 U.S. 349 (1978). In this case, a court granted, without notice or an opportunity to be heard, a mother's petition to have her retarded daughter sterilized. Years later the daughter discovered she had been sterilized without having been given notice or an opportunity to defend against such action, and brought suit against the judge for violation of her constitutional rights. Id., at 355-357. After determining that the judge did have subject-matter jurisdiction to hear such a petition, those claims were dismissed due to a determination by the district court that they were barred by the doctrine of judicial immunity. The Court of Appeals for the Seventh Circuit later reversed the district court finding that the judge had not had subject-matter jurisdiction to sterilize the young girl, and even if he had, it concluded he had lost any immunity by his failure to comply with the elementary principles of procedural due process. Id., at 357.

In a highly controversial and split decision, the Supreme Court reversed the Court of Appeals' finding that the judge was not entitled to judicial immunity. Specifically addressing the failure to provide notice and an opportunity to be heard, the Supreme Court determined first that a judge will not be deprived of immunity merely because his actions were in error, malicious, or in excess of his authority, but rather he will be subject to liability only when he has acted in the clear absence of jurisdiction. Id., at 355-357. Relying on Bradley, the Supreme Court in Stump then proceeded again to find that so long as a court of general jurisdiction has subject-matter jurisdiction, procedural errors such as the failure to give notice or an opportunity to be heard would not render a judge liable in damages. Id., at 358-360. The Court determined that to argue otherwise was to confuse the existence of authority with its proper exercise. Id., at 359.

From the beginning the ruling in Stump, although repeatedly followed, has been highly criticized. Justices Stewart, Marshall, and Powell entered dissenting opinions on the grounds that the judge's actions of having the girl sterilized were not those normally taken by a judge and were therefore non-judicial, and that it had been alleged the judge had acted maliciously and/or corruptly in excess of his jurisdiction. Id., at 364-369. Legal commentators have also persistently condemned this decision. See, e.g., Kates, Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered, 65 Nw. U.L. Rev. 615 (1970); Kattan, Knocking on Wood: Some Thoughts on the Immunities of State Officials to Civil Rights Damage Actions, 20 Vand. L. Rev. 941 (1977); Note, Immunity of Federal and State Judges From Civil Suit - Time for a Qualified Immunity?, 27 Case W. Res. L. Rev. 727 (1977); Note, Liability of Judicial Officers Under Section 1983, 79 Yale L. J. 322, 324-29 (1969); Rosenberg, Stump v. Sparkman: The

Doctrine of Judicial Immunity, 64 Va. L. Rev. 833 (1978); Waters, Federal Tort Law: Judges Cannot Invoke Judicial Immunity for Acts That Violate Litigant's Civil Rights - Dykes v. Hosemann, 21 Tort & Ins. L. J. 509-516 (1986); Block, Stump v. Sparkman and the History of Judicial Immunity, 5 Duke L. J. 879, 910-916.

5. Mireles v. Waco:

In 1991 the Supreme Court again revisited the issue of judicial immunity in the case of the deprivation of someone's constitutional rights. Mireles v. Waco, 502 U.S. 9 (1991). In that case it was alleged a judge ordered some police officers to forcibly, using excessive force if necessary, bring before him an attorney. Id., at 11. After determining the action was a judicial act, the Court further determined that the authorization or ratification of the officer's use of excessive force was merely an act in excess of the judge's authority, but that such act taken in the aid of the judge's subject-matter jurisdiction over the matter before him was not taken in the absence of jurisdiction. Id., at 13.

This decision was also split. Justices Stevens, Scalia and Kennedy gave dissenting opinions. Id., at 14-15. Although the dissenting opinions did not attack the decision on the basis that the court had lost jurisdiction due to the violation of the attorney's constitutional rights as Collie believes they could have, they were all in agreement that the ordering of a battery had no relation to a function normally performed by a judge, and was therefore not a judicial act. Id., at 14-15.

B. Clear Absence of All Jurisdiction:

Considering these cases and the additional history and analysis set forth therein, it can be safely said that the judicial

immunity doctrine has been twisted over the years from a doctrine which originally exempted from its protection those judges whose actions were either non-judicial or who acted in the clear absence of all jurisdiction, and which accepts the precept that the lack of personal jurisdiction through the deprivation of the right to notice and an opportunity to be heard would deprive a judge of jurisdiction, and thus immunity, into a doctrine that protects judges who have been alleged to have knowingly, maliciously or corruptly deprived an individual of their constitutional rights as long as they had subject matter jurisdiction.

The basis of this change in the law over time seems to be based on the majority having consistently viewed personal jurisdiction as being unnecessary to the court's authority or jurisdiction, and of a lesser importance than subject matter jurisdiction when considering whether there was a "clear absence of all jurisdiction" in a judicial immunity context. Rather than viewing constitutional rights such as the right to notice and an opportunity to be heard, as a jurisdictional prerequisite, to the court having any jurisdiction or "authority to act" at all, the majority has consistently dismissed these rights as mere "procedural matters" rather than the substantive rights they are. The majority has held that to allow suit in the face of a constitutional deprivation which removes from the court personal jurisdiction, would be to confuse authority with its proper exercise. Stump, 435 U.S. at 358-360. Thus under today's law, a judge who maliciously or knowingly acts without subject matter jurisdiction, will be held liable civilly for any damages he might cause as a result of his void orders, but a judge who maliciously or knowingly acts without personal jurisdiction, will be protected from civil liability for any damages he might cause as a result of his void orders.

In actual fact, to allow judicial immunity even in the face of knowing or malicious deprivations of clearly established constitutional rights, is not to confuse authority with its proper exercise, but it is to ignore the lack of authority all together. Constitutional guarantees such as due process are not mere "procedural matters" which have no affect on the court's jurisdiction or authority to act. To relegate a constitutional right such as notice and opportunity to be heard to a mere "procedural matter" is to negate the true nature of these rights. They are a jurisdictional prerequisite to any authority attaching at all. This Court has held in every other context that due process of law and other constitutional rights go to substance of right and not to matters of form or procedure, and that the violation of such rights not only causes the court to lose its jurisdiction, but causes the nullification of the judgment as void for that lack of jurisdiction. Frank v. Mangum, 237 U.S. 309, 327-331 (1915); Johnson v. Zerbst, 304 U.S. 458, 467 (1937). These are not mere "procedural matters" the violation of which has no affect on the court's jurisdiction. The violation of a clearly established constitutional right makes any act taken by the offending judge absolutely void of jurisdiction. A "procedural matter" would be one in which the court failed to follow the precise details any particular district court might set forth in its local rules as to what form notice and an opportunity to be heard are to take in that district. Under this example, the court may have violated its own rules, but this would not effect the court's jurisdiction over the matter, it would not deprive him of any authority to act, and it would not expose him to civil liability.

More recently, the Supreme Court has provided additional support to Collie's argument that there is no justification for distinguishing between subject-matter jurisdiction and personal jurisdiction when determining whether a court has

acted without jurisdiction in the judicial immunity context. See Ruhgras v. Marathon Oil, 526 U.S. 760 (1998). In Ruhgras the Supreme Court reversed the Fifth Circuit's en banc holding that a district court must determine whether it has subject-matter jurisdiction before it can determine whether it has personal jurisdiction.[6] Id. at 773. First, it held that the Fifth Circuit erred in according absolute priority to the subject-matter jurisdiction requirement on the ground that it is non-waivable and delimits federal-court power, while restrictions on a court's jurisdiction over the person are waivable and protect individual rights. Id. at 770-771. Second, it held that although the character of the two types of jurisdiction unquestionably differed, the distinctions did not mean that subject-matter jurisdiction is the more "fundamental". Id. at 771. It held that personal jurisdiction, too, is "an essential element of the jurisdiction of a district . . . court," without which the court is "powerless to proceed to adjudication." Id. at 771 (citing Employers Reinsurance Corp. v. Bryant, 299 U.S. 374, 382 (1937)).

Ruhgras makes it abundantly clear that a court acting without either subject-matter jurisdiction, or personal jurisdiction due to a violation of a parties constitutional due process rights, is not simply acting in excess of jurisdiction, but acting without any power to act at all. This is so because a judgment rendered without personal jurisdiction is as equally void as a judgment entered without subject-matter jurisdiction. If a court is lacking either one or both of these jurisdictional elements it will be said to lack "all jurisdiction." See e.g. Kulko v. Superior Court, 436 U.S. 84, 91

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[6] This ruling essentially upheld the dissenting opinion in the case below which found "efficiency concerns cannot offer a justification for a federal court to reach the *merits* of a dispute in the absence of federal jurisdiction, **personal or subject matter.** There must be jurisdiction to decide the merits. That is what jurisdiction is." Marathon Oil Co. v. Ruhgras, A.G., 145 F.3d 211, 231-232 (5th Cir. 1997)(emphasis added).

(1978)("(i)t has long been the rule that a valid judgment imposing a personal obligation or duty in favor of the plaintiff may be entered only by a court having jurisdiction over the person of the defendant"); In Re Wellman, 3 Kan. App. 100, 45 P. 726, 727 (1896) (ex parte guardianship proceeding would be a "flagrant violation" of due process, rendering any order null and void).

This lack of authority to act due to lack of personal jurisdiction alone has been so clearly settled in every other context other then when considering the judicial immunity doctrine, that the Supreme Court has held a party may actually ignore an order issued by a court lacking personal jurisdiction, and that sanctions can not be applied for refusing to follow such an order. Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinee, 456 U.S. 694, ___, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982). Clearly this could not be the case if that court's order were still considered a judicial act taken within the court's jurisdiction.

It is clear to Collie that the majority, and this Court, have improperly attributed in the judicial immunity context a superior importance to subject matter jurisdiction over personal jurisdiction which is in direct conflict with this Court's rulings as to the nature of personal jurisdiction and constitutional rights such as the right to due process, and that to do so is a misapplication of the common law doctrine of judicial immunity as it was originally stated and intended. See e.g., Bradley, 80 U.S. (13 (Wall.) at 351 (when a judge knows that he lacks jurisdiction, or acts in the face of clearly valid statutes or case law expressly depriving him of jurisdiction, judicial immunity is lost).

It does not make sense that a judge who knowingly or maliciously acts without subject matter jurisdiction will still

be held liable today, but one who acts knowingly or maliciously without personal jurisdiction due to a failure to provide due process will not be held liable. They are equally without any jurisdiction or authority to act in the true sense of the word, and in both cases their actions would be deemed void or as having been taken without any authority.

III.

THE PETITION SHOULD BE GRANTED BECAUSE THE MAJORITIY'S OPINION, INCLUDING THAT OF THIS COURT, THAT JUDICIAL IMMUNITY BARRS A CLAIM ARISING OUT OF THE VIOLATION OF CONSTITUTIONAL DUE PROCESS RIGHTS, PLACES A COURT CREATED DOCTRINE OVER THAT OF A CONSTITUTIONALLY GUARANTEED RIGHT WHEN THERE ARE EQUALLY EFFECTIVE AND LESS RESTRICTIVE MEANS AVAILABLE TO PROTECT THE INTERESTS OF INDEPENDENCE IN THE JUDICIARY.

In order for the courts to favor a judicially created doctrine over a constitutionally guaranteed right, there must be a very strong public policy reason for doing so, and there must not be any less restrictive means of meeting that purpose. In this case, the courts have pointed to the need to maintain a free independence among the judiciary; the argument being if they can be threatened with personal liability their judgments will be affected. This freedom could easily be maintained and protected by the assertion of a qualified immunity defense the same as all other state or government actors in a civil rights case. If the judge did not know he was acting without jurisdiction, whether personal or subject matter, or he did not know he was violating some ones rights, then he won't be held liable.

IV.

THE PETITION SHOULD BE GRANTED BECAUSE THE DISBARMENT OF AN ATTORNEY FROM AN ENTIRE DISTRICT COURT IS AN ADMINISTRATIVE FUNCTION, NOT A JUDICIAL FUNCTION, WHICH CAN IN FACT HAVE BEEN PERFORMED BY A NON-JUDGE SUCH AS THE STATE BAR.

As previously conceded it is correct that a judge may not be held personally liable for their judicial or adjudicatory acts. However, "truly judicial acts. . . must be distinguished from the administrative, legislative, and executive functions that judges may occasionally be assigned by law to perform." Forrester v. White, 484 U.S. 219, 227, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988). "Difficulties have arisen primarily in attempting to draw the line between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges." Id. at 227.

Collie argues, despite any holdings to the contrary, that the court's inherent power to disbar an attorney is actually administrative in nature.[7] It has been held by the Supreme Court of Texas that a court's inherent powers, such as the power to regulate the bar, are administrative powers, not jurisdictional powers. Chenault, etal. v. Phillips, etal. ___ S.W.2d ___ (Tex. 1996)(citing State Bar of Texas v. Gomez, 891 S.W.2d 243, 245 (Tex. 1994)). "Inherent powers" are those "reasonably required to enable a court to perform efficiently its judicial functions, to protect its dignity,

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[7] It might be argued that Kendall did not act pursuant to his inherent powers in disbarring Collie, but under a Local Rule of the Northern District of Texas. Collie contends this rule is merely a codification of this inherent powers. Buchmeyer during a conversation with Collie and Hernandez referred to these rules as administrative when explaining to Collie why they did not have to follow them.

independence and integrity, and to make its lawful action effective". See generally, Jim R. Carrigan, Inherent Powers of the Courts 2 (1973). Black's Law Dictionary (5th Ed.) defines "inherent powers" as, "those reasonably necessary for administration of justice." The federal courts, too, have described "inherent powers" in similarly administrative tones. See, e.g., Eash v. Riggins Trucking, Inc., 757 F.2d 557, 560-565 (3rd Cir. 1985); In Re Stone, 986 F.2d 898 (5th Cir. 1993).

Collie argues it is clear that inherent powers, such as the power to disbar an attorney for contempt, or as a sanction, are administrative powers intended to enable the court to perform its judicial functions, to protect its dignity, independence and integrity, etc. Furthermore, Collie would show that the Grievance Committee, as the arm of the Supreme Court in the discharge of its professional policing duties, is an administrative agency.[8] The State of Texas, etal v. Sewell, 487 S.W.2d 716, ___ (Tex. 1972). As such, Collie argues that the act of suspending or disbarring an attorney by a judge is an administrative act.

It is the nature of the function performed, adjudication of the merits, not the identity of the actor who performed it, that controls the immunity analysis. Forrester, 484 U.S. at 225-229. To conclude that because a judge acts within the perceived scope of his authority, such as disbarring an attorney pursuant to its inherent sanction or contempt powers, that that act is a judicial act is to lift form over substance. There are many functions which a judge may have in the course of adjudicating cases which come before it, and a judge may indeed have the power to perform said functions,

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[8] Prior to the State Bar Act of 1939 the courts would handle this function, but since this Act the State Bar Association is suppose to handle these administrative matters.

but this does not mean that everything the judge does, or that it can do, in this connection is judicial in nature. It is argued in this case, that the act of disbarment was an act of punishment and enforcement, an administrative act, not a judicial act.

V.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S HOLDING IN PULLIAM V. ALLEN TO THE EXTENT IT AFFIRMS THE DISTRICT COURT'S DISMISSAL OF A BIVENS CLAIM FOR PROSPECTIVE INJUNCTIVE AND EQUITABLE RELIEF PURSUANT TO THE JUDICIAL IMMUNITY DOCTRINE.

Collie contends she is entitled to equitable and injunctive relief against Kendall and Buchmeyer under Bivens. The Supreme Court has held that judges are not immune from claims for prospective injunctive relief brought under 42 U.S.C. Sec. 1983. Pulliam v. Allen, 466 U.S. 522, 541-42 (1984). There is no valid reason to hold otherwise with regard to a claim brought under Bivens, rather than 42 U.S. C. Sec. 1983. This issue has not yet been addressed by the Supreme Court, but should be in light of the rulings in several district court cases which appear to be in conflict with Pulliam. See e.g., Mullis v. United States Bankruptcy Court for District of Nevada, 828 F.2d 1385, 1391-94 (9th Cir. 1987), cert. denied, 486 U.S. 1040 (1988); Stephens v. Herring, 827 F.Supp. 359, 361-65 (E.D. Va. 1993); Wightman v. Jones, 809 F. Supp. 474, 476-79 (N.D. Tex. 1992); and Page v. Grady, 788 F.Supp. 1207, 1208-13 (N.D. Ga. 1992).

VI.

PETITION SHOULD BE GRANTED IN THIS CASE BECAUSE THE LOWER COURTS HAVE USED THE SANCTION AS A MEANS OF SILENCING A LEGITIMATE GOOD FAITH ARGUMENT FOR THE EXTENSION, MODIFICATION, OR REVERSAL OF EXISTING LAW OR THE ESTABLISHMENT OF NEW LAW WHICH IS IN FACT SUPPORTED BY DISSENTING OPINIONS, SCHOLARLY ARTICLES, AND A LOGICAL ARGUMENT SUPPORTED BY LAW AND REASON.

Collie and her counsel were sanctioned with monetary sanctions for the alleged violation of Rule 11(b)(2) which requires an attorney or unrepresented party certify that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that "the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."

Sanctions in this case were improper because Collie's legal arguments were made after a reasonable inquiry into the law and are either "warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Whatismore, Collie's arguments are supported by dissenting opinions and scholarly articles, as well as, the application of law applied to the issues of jurisdiction, personal jurisdiction, and due process in other contexts. Support, even in dissenting opinions, should be taken into consideration in determining whether a legal argument in a case is frivolous. Fed. R. Civ. P., 11 (Notes of Advisory Committee on Rules,

1993 Amendment).

It is true that to date the courts have chosen not to rule the violation of a person's constitutional due process rights will strip a judge of judicial immunity by either making the act a non-judicial act or one taken without any jurisdiction. This does not mean that there is no basis to make the arguments Collie has made. A number of the cases that have ruled on this topic have had dissenting opinions in direct support of Collie's arguments, or the majority opinions themselves have recognized the potential for injustice in such a situation.

Collie and Hernandez have been sanctioned in this case merely because they have taken the unpopular and minority view in an ongoing legal discussion. This does not make a case frivolous. Additionally, the mere fact that there have been cases to have previously ruled on these topics in a manner contrary to Collie's contentions, does not mean her legal arguments are frivolous or forever barred. If this were the case, no finally decided legal precept could ever be challenged regardless of the changing societal beliefs or laws. The fact remains Collie and Hernandez thoroughly researched the issue of judicial immunity before filing suit and had concluded in good faith there was room to argue for another interpretation and application of the doctrine of judicial immunity which would allow an exception to the rule when a court knowingly or maliciously violates someone's constitutional due process rights.

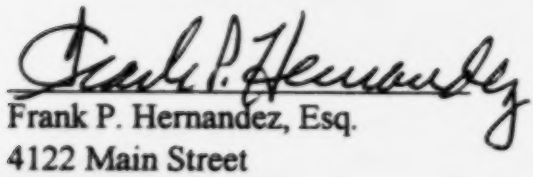
CONCLUSION

For the reasons stated herein petition for writ of certiorari should be granted. This case presents a question of exceptional importance - whether the Court will assign the

appropriate importance to personal jurisdiction and constitutionally protected due process that they deserve. To allow the opinions below to stand, is to allow the continuation of a legal falsity and to diminish the very source of a federal court's jurisdiction; the Constitution of the United States.

Accordingly, Petitioners Noemi A. Collie and Frank P. Hernandez, respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted,



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COUNSEL FOR
APPELLANT NOEMI COLLIE,
and PRO SE

United States Court of Appeals
Fifth Circuit

No. 99-10722
No. 99-11025
(Summary Calendar)

NOEMI A. COLLIE,

Plaintiff-Appellant,

versus

JOE KENDALL, U.S. District Judge; JERRY L. BUCHMEYER, Chief District Judge,

Defendant-Appellee.

Appeals from the United States District Court
for the Northern District of Texas
USDC No. 3:98-CV-1678-G

Before DAVIS, EMILIO M. GARZA, and DENNIS, Circuit Judges.

PER CURIAM:*

Noemi Alessandra Collie appeals from the dismissal of her *Bivens* action against United States District Judge Joe Kendall and United States Chief District Judge Jerry L.

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Buchmeyer. Collie and her attorney, Frank Hernandez, also appeal from the imposition of sanctions against them pursuant to Fed. R. Civ. P. 11, For the reasons set forth below, we dismiss the appeals as frivolous.

Collie was suspended from the practice of law before the district court by Judge Kendall pending payment of monetary sanction.[1] The suspension was affirmed by Chief Judge Buchmeyer. Collie was ultimately reinstated after she paid the sanction. We subsequently held that Collie's right to due process had been violated because she had not received notice and an opportunity to be heard before she was suspended. *See Dailey v. Vought Aircraft Co.*, 141 F.3d 224, 230-31 (5th Cir. 1998).

Collie, represented by Hernandez and acting as *pro se* co-counsel, filed a complaint against Judge Kendall and Chief Judge Buchmeyer pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), regarding the due process violation that we recognized. Collie sought both damages and injunctive relief in the form of (1) an order barring either judge from presiding over any cases in which Collie or Hernandez participated, (2) an order for all of the district judges of the Northern District of Texas to comply with the Federal Rules of Civil Procedure, all local rules, and the Constitution when dealing with her or Hernandez, and (3) an order requiring Judges Kendall and Chief Judge Buchmeyer to announce at every docket call that they had wrongfully suspended Collie and that her suspension had been overturned on appeal.[2]

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[1] Her suspension was subsequently modified to allow Collie to participate in her ongoing cases.

[2] Since Hernandez had previously been suspended from practice before the district court, District Court Judge Fish ordered Collie to substitute counsel or be prepared to proceed *pro se*.

Judge Kendall and Chief Judge Buchmeyer moved for dismissal on the basis of absolute judicial immunity and for the imposition of sanctions pursuant to Fed. R. Civ. P. 11. The district court dismissed Collie's action on these grounds and sanctioned Collie and Hernandez for the amount of attorney's fees incurred by Judge Kendall and Chief Judge Buchmeyer. Collie filed a timely appeal.

On appeal, Collie contends that the judges were not absolutely immune from her claims for damages and injunctive relief. Specifically, she argues that the doctrine of absolute immunity does not apply here because (1) the deprivation of due process recognized by this court in *Dailey* deprived the judges of all jurisdiction, (2) the suspension of an attorney is an administrative rather than a judicial act, (3) a district court lacks subject matter to disbar an attorney, and (4) the micro-management of an attorney's practice is administrative, not judicial, in nature.

When damages are sought, "[a]bsolute judicial immunity extends to all judicial acts that are not performed in the clear absence of all jurisdiction." *Malina v. Gonzales*, 994 F.2d 1121, 1124 (5th Cir. 1993). In assessing an immunity claim, we consider four factors: "(1) whether the precise act complained of is a normal judicial function; (2) whether the acts occurred in the courtroom or appropriate adjunct spaces such as the judge's chambers; (3) whether the controversy centered around a case pending before the court; and (4) whether the acts arose directly out of a visit to the judge in his official capacity." *Id.* All of these factors support the district court's finding that Judge Kendall and Chief Judge Buchmeyer were absolutely immune from Collie's claim for damages.

First, a deprivation of procedural due process does not

constitute an action in the clear absence of all jurisdiction so as to strip a judge of absolute immunity. *See Stump v. Sparkman*, 435 U.S. 349, 355-60 (1978). Second, a suspension or disbarment proceeding is adversarial and quasi-judicial in nature, *see United States v. Brown*, 72 F.3d 25, 29 (5th Cir. 1995), and is therefore judicial in nature. Third, Collie was suspended in an order issued by the district court in an ongoing legal action as a sanction for her conduct in litigation before the district court. *See Malina v. Gonzales*, 994 F.2d 1121, 1124 (5th Cir. 1993).

With respect to Collie's claim of injunctive relief, we note that we have not yet determined whether federal judges who are named as defendants in *Bivens* actions enjoy absolute immunity against claims seeking injunctive relief. However, we need not decide this issue here. In this case, the injunctive relief that Collie seeks is frivolous and, in some respects, ridiculous. As such, we will not grant the requested relief.

Collie next contends that the district court improperly deprived her of her counsel of choice when it ordered Hernandez, who had been suspended from practice before the district court, to withdraw from the case. Because Collie impermissibly makes this argument by incorporating her district court pleadings by reference, she waives the argument and we need not address its merits. *See Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993).

Next, Collie contends that the district court erred in imposing sanctions against (1) Collie, because she was a represented party, and (2) Hernandez, because he withdrew from representation and had no control over whether any frivolous pleadings were withdrawn pursuant to Fed. R. Civ. P. 11(c)(1)(A). She further argues that the sanctions order was erroneous because she and Hernandez made their

argument regarding judicial immunity in good faith, though admittedly in the fact of established legal precedent. These arguments are frivolous for several reasons.

First, because Collie is an attorney and signed the complaint as *pro se* co-counsel, the provision of Rule 11 against sanctioning a represented party did not apply to her. *See Jennings v. Joshua Ind. Sch. Dist.*, 948 F.2d 194, 197 (5th Cir. 1992)("In *Business Guides*, the Supreme Court held that any attorney, represented party, or pro se litigant who signs a pleading or other paper or affidavit without first conducting a reasonable inquiry may be liable for Rule 11 sanctions."). Second, Hernandez was served with the Rule 11 motion for sanctions and, rather than disassociating himself from the complaint within the twenty-one-day period for avoiding sanctions, he argued that the complaint had merit. *See* Fed. R. Civ. P. 11(c)(1)(A).[3] In this situation, the district court's decision to sanction Hernandez for a frivolous motion that he signed was not plainly erroneous solely because Hernandez had been ordered out of the case.[4] Third, Collie's argument against judicial immunity against damages actions amounted to nothing more than an argument that long-standing precedent was wrong and should be changed. Collie's concedes that she knew her argument was counter to established precedent and she presents no "non frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Fed. R. Civ. P. 11(b)(2). Accordingly, the imposition of sanctions was not

[3] We recognized that because Hernandez signed the complaint as co-counsel, he might not have been able to comply with the letter of Rule 11(c)(1)(A) – which requires withdrawal or correction of the challenged filing within twenty-one days – on his own. At the very least, however, he could have complied with the spirit of that rule by filing a motion disavowing the complaint on his own behalf.

[4] Because Hernandez raises the argument that he had no control over the filing of frivolous pleadings for the first time on appeal, we review this argument under the plain-error standard of review. *See Douglas v. United States Servs. Auto. Ass'n*, 79 F.3d 1415, 1428 (5th Cir. 1996)(en banc).

an abuse of discretion. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

This is the second time that Collie has raised the same meritless arguments that the doctrine of absolute judicial immunity does not apply to the instant case. We take this opportunity to warn Collie that the filing of any further frivolous appeals in this court -- including any frivolous petitions for rehearing -- will result in the imposition of sanctions under Fed. R. App. P. 38.

For the reasons set forth above, the appeals are DISMISSED pursuant to 5th Cir. R. 42.2. SANCTIONS WARNING ISSUED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NOEMI A. COLLIE,	*	
	*	
Plaintiff,	*	
	*	
VS.	*	CIVIL ACTION NO.
	*	3:98-CV-1678-G
JOE KENDALL, and	*	
JERRY BUCHMEYER,	*	
	*	
Defendants.	*	

MEMORANDUM ORDER

Before the court is the motion of defendants Joe Kendall and Jerry Buchmeyer (collectively, the "defendants") to dismiss the plaintiff's claims against them pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the following reasons, the defendants' motion is granted.

I. BACKGROUND

The defendant Joe Kendall ("Judge Kendall") is a United States District Judge for the Northern District of Texas. *See* Plaintiff's Original Complaint and Jury Demand ("Complaint") ¶ 4. The defendant Jerry Buchmeyer ("Judge Buchmeyer") is the Chief Judge for the Northern District of Texas. *See id.* ¶ 5. The plaintiff Noemi A. Collie ("Collie") is an attorney who practices in the Northern District of Texas. *See id.* ¶ 3.

On January 6, 1995, Judge Kendall sanctioned Collie for

violating Rules 11(b)(1) and (b)(3) of the Federal Rules of Civil Procedure by repetitiously asserting essentially the same claims against the same defendant *in multiple lawsuits.*[1] *Id.* 13. Judge Kendall ordered Collie to pay the defendant's costs and attorneys' fees. The Fifth Circuit Court of Appeals affirmed the sanctions order. *See Dailey v. Vought Aircraft Company*, 82 F.3d 415 (5th Cir. 1996)(table). Complaint 15. Collie, however, failed to timely pay the sanctions. Therefore, on July 18, 1996, Judge Kendall ordered that Collie be barred from practicing in the Northern District until she complained with his order and paid the sanctions. *Id.* ¶ 20. Judge Kendall entered an order of disbarment without giving Collie notice or an opportunity to be heard on the matter. *Id.* ¶¶ 22-24.

Collie petitioned Chief Judge Buchmeyer for relief from Judge Kendall's order, as provided for by the local rules of the Northern District of Texas. *Id.* ¶¶ 23. *See* N. Dist. Tex. R. 13.2(b).[2] On September 6, 1996, Judge Buchmeyer held an evidentiary hearing on Collie's petition. Complaint ¶ 29. After considering Collie's explanation of the reasons she had failed to comply with Judge Kendall's orders, Judge Buchmeyer denied Collie's petition. *Id.* ¶ 30. Collie then appealed to the Fifth Circuit. *Id.* ¶¶ 34-35

In a published opinion issued May 12, 1998, the Fifth Circuit held that the actions of Judge Kendall and Judge Buchmeyer deprived Collie of her procedural due process rights guaranteed by the United States Constitution and the Local Rules of the Northern District of Texas. *Id.* ¶ 41. See *Dailey v. Vought Aircraft Company*, 141F.3d 224, 226 (5th Cir. 1998). Specifically, the court held that Judge Kendall erred in suspending Collie without notifying her that the

[1] Collie represented plaintiff Ollie Dailey ("Dailey") before Judge Kendall in three separate lawsuits brought against Dailey's employer, Vought Aircraft Company. *See Dailey v. Vought Aircraft Company*, 141 F.3d 224, 226 (5th Cir. 1998)(describing procedural history of those cases).

failure to timely pay the sanctions constituted grounds for disbarment and without affording her an opportunity to be heard with respect to the disbarment. *Id.* at 230. The court further held that Judge Buchmeyer erred in failing to give Collie sufficient notice and time to prepare for the hearing conducted before him. *Id.* at 231.

On July 20, 1998, Collie filed this case asserting a *Bivens* claim[2] against Judge Kendall and Judge Buchmeyer "for the use of their official offices to knowingly and intentionally deprive and conspire to deprive her of her constitutional rights under the First, Fourth, Fifth, and Fourteenth Amendments to the Constitution." Complaint ¶ 47. Collie seeks monetary damages, prospective injunctive relief, and equitable relief.[3]

The defendants have moved to dismiss Collie's complaint on the ground that the doctrine of judicial immunity shields them from any liability for the actions complained of.

II. ANALYSIS

A. Standard for Dismissal Under Rule 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted." A motion under Rule 12(b)(6)

[2] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

[3] Among other things, Collie's complaint seeks (1) $2.5 million in damages; (2) an injunction preventing Judge Kendall and Judge Buchmeyer from taking any case which might be randomly assigned to them in which Collie or her attorney are counsel of record for so long as Collie or her attorney practice in the Northern District of Texas; and (3) an order requiring Judge Kendall and Judge Buchmeyer "to announce in their courtroom at the call of every docket for the next year that Plaintiff Collie had been wrongfully disbarred by them in contravention of her constitutional rights and that such order has been set aside and vacated by the Fifth Circuit Court of Appeals." *See* Complaint at 11, ¶ 53, and at 12, ¶¶ (b), (c), and (e).

should be granted only if it appears beyond doubt that the plaintiff could prove no set of facts in support of her claim that would entitle her to relief. *Conley v. Gibson*, 355 U.S. 41-46 (1957); *Leffall v. Dallas Independent School District*, 28 F.3d 521, 524 (5th Cir. 1994); see also *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983)(citing Wright & Miller, Federal Practice and Procedure: Civil § 1357 at 598 (1960) for the proposition that "the motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted.").

In determining whether dismissal should be granted, the court must accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff. *Capital Parks, Inc. v. Southeastern Advertising and Sales System, Inc.*, 30 F.3d 627, 629 (5th Cir. 1994); *Norman v. Apache Corporation*, 19 F.3d 1017, 1021 (5th Cir. 1994); *Chrissy F. by Medley v. Mississippi Department of Public Welfare*, 925 F.2d 844, 846 (5th Cir. 1991).

B. Judicial Immunity

It is well-settled that judges are absolutely immune from suits for damages for all judicial acts that are not performed in the clear absence of all jurisdiction. See *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991); *Mays v. Sudderth*, 97 f.3d 107, 111 (5th cir. 1996); *Malina v. Gonzalez*, 994 F.2d 1121, 1124 (5th Cir. 1993).

A judge will not be deprived of immunity simply because the plaintiff alleges that his actions were malicious or were taken in bad faith. *Mireles*, 502 U.S. at 11; see also *Mays*, 97 F.3d at 111. Nor will a judge be deprived of immunity because the actions he took were in error or were in excess of

his authority. See *Stump v. Sparkman*, 435 U.S. 349, 356 (1978); see also *Mays*, 97 F.3d at 111; *Brandley v. Keeshan*, 64 F.3d 196, 200 (5th Cir. 1995), *cert. denied*, 516 U.S. 1129 (1996). Rather, a plaintiff can overcome the bar of judicial immunity only under two narrow sets of circumstances. See *Mireles*, 502 U.S. at 11-12; see also *Boyd v. Biggers*, 31 F.3d 279, 284 (5th Cir. 1994). First, a judge is not immune from suit for actions that are not "judicial" in nature. See *Mireles*, 502 U.S. at 11; *Malina*, 994 F.2d at 1124. Second, a judge is not immune from suit for actions that, though judicial in nature, are taken in the complete absence of all jurisdiction. See *Mireles*, 502 U.S. at 12; *Malina*, 994 F.2d at 1124.

1. Collie's Monetary Claims Against Judge Kendall are Barred by Judicial Immunity

Collie claims that Judge Kendall violated her constitutional rights by entering then sanctions order and the order disbarring her from practicing in the Northern District without notice or hearing. *See* Complaint ¶ 48. She argues that Judge Kendall is not entitled to judicial immunity because his act was administrative, rather than judicial, in nature and because he acted in the clear absence of all jurisdiction. See *id.*

Whether a judge's challenged conduct is a "judicial act" must be determined by "the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity." *Mireles*, 502 U.S. at 12. In contrast, an administrative act is one which has significance independent of the fact that the actor is a judge. See *Forrester v. White*, 484 U.S. 219, 228-30 (1988)(holding that the hiring or firing of staff members is an administrative, not a judicial, act). Under Fifth Circuit precedent, a court should consider the following factors to determine whether a judge's

act was judicial in nature: (1) whether the precise act complained of is a normal judicial function, (2) whether the acts occurred in the courtroom or appropriate adjunct spaces such as the judge's chambers, (3) whether the controversy centered around a case pending before the court, and (4) whether the acts arose directly out of a visit to the judge in his official capacity. *Malina* , 994 F.2d at 1124 (citing *McAlester v. Brown*, 469 F.2d 1280, 1282 (5th Cir. 19;72)). These factors should be construed liberally in favor of immunity. See *Adams v. McIlhany*, 764 F.2d 294, 297 (5th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986).

Consideration of these factors leads ineluctably to the conclusion that Judge Kendall's acts were judicial in nature. First, Judge Kendall's entry of the order disbarring Collie for failing to comply with his earlier sanctions order was a normal judicial function. See *Sindram v. Suda*, 986 F.2d 1459, 1460 (D.C. Cir. 1993)(holding that imposing sanctions and prohibiting party from filing additional actions before paying sanctions were acts "well within the judges' judicial capacity"); *Crooks v. Maryland*, 913 F.2d 699, 700 (9th Cir. 1990)(holding that judge acted in judicial capacity when he entered and enforced a sanctions order against clerk of court). Second, there is no allegation that the challenged acts occurred anywhere other than in Judge Kendall's chambers or courtroom. Third, the instant controversy over Collie's disbarment arose out of the *Dailey* cases pending before Judge Kendall. Finally, the sanctions and disbarment were ordered as a direct result of a motion made by the defendant in the *Dailey* cases and presented to Judge Kendall in his official capacity. Furthermore, Judge Kendall's actions have no significance independent of the fact that he is a judge. Therefore, Judge Kendall's actions were judicial in nature.

Because his actions were clearly judicial in nature, Judge

Kendall is entitled to absolute immunity from Collie's claims unless he acted in the complete absence of all jurisdiction. An act is done is complete absence of all jurisdiction if the matter upon which the judge acts is clearly outside the subject matter jurisdiction of the court. In this case, Judge Kendall acted to enforce his previous sanctions order, which had been affirmed on appeal. It is well-established that a district court judge has jurisdiction to enforce his own sanctions orders pursuant to Rule 11 and the court's inherent powers. See *Chambers v. NASCO, Inc.*, 501 U.S. 42, 42-51 (1991); see also *Adams*, 764 F.2d at 298 (holding that a court of general jurisdiction has jurisdiction to punish a party for contempt). Still, Collis insists Judge Kendall acted in the absence of all jurisdiction because his actions were held to involve errors of Constitutional due process. This argument fails, however, because a judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors. See *Stump*, 435 U.S. at 359 (rejecting the plaintiff's argument that the defendant judge acted without jurisdiction because the judge failed to comply with "elementary principles of procedural due process"); see also *Brandley*, 64 F.3d at 200; *Adams*, 764 F.2d at 298; *Rheuark v. Shaw*, 628 F.2d 297, 304 (5th cir. 1980)(holding that judge was entitled to immunity even though delay by the judge in processing the plaintiffs criminal case amounted to a denial of due process), *cert. denied*, 450 U.S. 931 (1981). Therefore, Judge Kendall's actions with respect to Collie's disbarment were not taken in the absence of all jurisdiction.

Since Judge Kendall's action in disbarring Collie, even without notice or a hearing, was a judicial act that was not taken in the complete absence of all jurisdiction, Judge Kendall is absolutely immune from Collie's suit for damages.

2. Collie's Monetary Claims Against Judge Buchmeyer are Barred by Judicial Immunity

Collie complains of two specific acts by Judge Buchmeyer. First, she alleges that Judge Buchmeyer conspired with Judge Kendall to "micro-manage" her practice in the Northern District following Judge Kendall's order of disbarment.[4] See *id.* ¶ 49(6).

Collie argues, as she does in her claims against Judge Kendall, that Judge Buchmeyer is not entitled to judicial immunity because his acts were not judicial in nature and were taken in the absence of all jurisdiction. *See* Complaint ¶ 49(a) and (b). However, under the analysis outlined above, it is clear that Judge Buchmeyer's acts were judicial in nature. Judge Buchmeyer became involved in this matter only because Collie appealed to him under Local Rule 13.2(b) to exercise his power as Chief Judge to review the disbarment order entered by Judge Kendall. In denying Collie's petition and reviewing her pending cases, Judge Buchmeyer acted to resolve a dispute in an existing case that had been brought before him by Collie herself. See *Malina*, 994 F.2d at 1124-25 (holding that two factors that determine whether a judge's act is judicial in nature include whether the controversy centered around a case pending before the court and whether the act arose directly out of a visit to the judge in his official capacity); see also *Cameron v. Seitz*, 38 F.3d 264, 271 (6th Cir. 1994) (holding that when a judge decides a dispute that is brought to him in his role as a judge, he performs the "quintessential" judicial function). All contact between Collie and Judge Buchmeyer occurred through written

[4] After Judge Kendall barred Collie from practicing in the Northern District, Judge Kendall and Judge Buchmeyer reviewed her pending cases to determine whether the bar should be selectively lifted in some cases to avoid unduly prejudicing Collie's clients in those cases. Complaint ¶ 24. At the appeal hearing before him, Judge Buchmeyer informed Collie that she would be allowed to proceed as counsel on five of her pending cases.

pleadings or telephone calls and visits to the Judge in his courtroom or chambers. See *Malina*, 994 F.2d at 1124 (holding that another factor determining whether a judge's act is judicial in nature or whether the act occurred in the courtroom or appropriate adjunct spaces such as the judge's chambers). In denying her petition and reviewing her pending cases, Judge Buchmeyer did not act in the complete absence of all jurisdiction. Collie herself invoked Judge Buchmeyer's jurisdiction under Local Rule 13.2(b) when she asked him to set aside Judge Kendall's disbarment order. Furthermore, as explained in the previous section, the fact that his actions may have violated Collie's procedural due process rights does not deprive Judge Buchmeyer of jurisdiction or judicial immunity.

Because Judge Buchmeyer's actions were judicial in nature and were not taken in the complete absence of all jurisdiction, Judge Buchmeyer is absolutely immune from Collie's suit for damages.

3. Collie's Claims for Injunctive and Equitable Relief are also Barred by Judicial Immunity

In *Pulliam v. Allen*, 466 U.S. 522, 541-42 (1984), the Supreme Court held that state court judges are not immune from claims for prospective injunctive relief brought under 42 U.S.C. Sec. 1983. Neither the Supreme Court not the Fifth Circuit Court of Appeals, however, has considered whether the judicial immunity of a federal judge extends to *Bivens* claims for declaratory, injunctive, or other equitable relief such as Collie is seeking in this case.

Although the Supreme Court has observed generally that for purpose of immunity, there is no difference between claims brought under Section 1983 and claims brought under

Bivens, see *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 433 n. 5 (1993)(considering immunity of court reporters); *Butz v. Economou*, 438 U.S. 478, 503-04 (1978)(considering immunity of federal executive officers), at least four federal courts have held that federal judges enjoy the same immunity from suits seeking equitable relief as they do from suits seeking damages. See *Mullis v. United States Bankruptcy Court for District of Nevada*, 828 F.2d 1385, 1391-94 (9th Cir. 1987), *cert. denied*, 486 U.S. 1040 (1988); *Stephens v. Herring*, 827 F.Supp. 359, 361-65 (E.D. Va. 1993); *Wightman v. Jones*, 809 F. Supp. 474, 476-79 (N.D. Tex 1992); and *Page v. Grady*, 788 F. Supp. 1207, 1208-13 (N.D. Ga 1992).

This court concurs with these decisions, all of which hold that, in the context of a *Bivens* action, judicial immunity bars claims for declaratory, injunctive, and other equitable relief as well as claims for damages. As the court explained in *Mullis*, the rationale supporting the decision in *Pulliam* is inapplicable in a *Bivens* context. *Mullis*, 828 F.2d at 1394; see also *Stephens*, 827 F.Supp. at 364-65; *Wightman*, 809 F.Supp. at 476-79; *Page*, 788 F.Supp. 1211-13. Specifically, the Court in *Pulliam* concluded that common law tradition, which permitted courts of the King's Bench to issue injunctive-type writs against federal courts, was consistent with the practice of allowing federal courts to enjoin state court judges under Section 1983. *Pulliam*, 466 U.S. at 529-39. There is, however, no common law tradition which allows the use of injunctive relief against courts of equal stature in the same court system. See *Stephens*, 7 F.Supp. at 364; *Wightman*, 809 F. Supp. at 477. Therefore, the common law is consistent with a finding that federal judges are absolutely immune from *Bivens* claims, such as Collie's, seeking injunctive and other equitable relief. Furthermore, the Court in *Pulliam* determined that because Congress intended

Section 1983 to apply to all state actors, Congress did not intend to expand the common law doctrine to judicial immunity to insulate state judges from federal collateral review. *Pulliam*, 466 U.S. at 541. A *Bivens* action, however, is judicially created. Thus, there is no corresponding Congressional intent to abrogate federal judicial immunity for *Bivens* claims for equitable relief. See *Stephens*, 827 f.Supp. at 364; *Wightman*, 809 F. Supp. at 478. Finally, as these other courts have recognized, strong policy considerations favoring judicial economy and protection of the finality of judgments support a conclusion that judicial immunity bars *Bivens* claims seeking declaratory, injunctive, or equitable relief. See *Mullis*, 828 F.2d at 1392-93; see also *Wightman*, 809 F. Supp. at 479 (opining that refusing judicial immunity for *Bivens* claims for equitable relief would allow "horizontal appeals" and "reverse review" of federal court decisions).

Accordingly, Judge Kendall and Judge Buchmeyer are immune from Collie's claims seeking injunctive and equitable relief.

III. CONCLUSION

For the reasons discussed above, Collie's claims against Judge Kendall and Judge Buchmeyer are barred by absolute judicial immunity. Therefore, the defendants' motion to

dismiss Collie's complaint in its entirety is **GRANTED.**[5]
SO ORDERED.

May 19, 1999.

/S/
A. JOE FISH
United States District Judge

[5] The pending motions by the defendants for sanctions under Rule 11, F.R.Civ. P., will be the subject of a separate order. Dismissal of Collie's claims by the memorandum order and judgment entered today does not deprive this court of the power to impose such sanctions. *Willy v. Coastal Corporation*, 915 F.2d 965, 966-69 (5th Cir. 1990), *aff'd*, 503 U.S. 131 (1992). See also *Topalian v. Ehrman*, 3 F.3d 931, 933 (5th Cir. 1993)(while district court's order granting summary judgment against plaintiff's on appeal, the district court imposed Rule 11 sanctions against the plaintiffs and their counsel); *McCampbell v. KPMG Peat Marwick*, 982 F.Supp. 445, 446-49 (N.D. Tex. 1997)(non-monetary Rule 11 sanctions imposed after disposition of case on the merits); *Taylor v. County of Copiah*, 937 F.Supp. 580, 583, 585-86 (S.D. Miss. 1995)(district court granted summary judgment for defendant, then conducted and granted motion for Rule 11 sanctions more than one year later).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NOEMI A. COLLIE,	*	
	*	
Plaintiff,	*	
	*	
VS.	*	CIVIL ACTION NO.
	*	3:98-CV-1678-G
JOE KENDALL, and	*	
JERRY BUCHMEYER,	*	
	*	
Defendants.	*	

MEMORANDUM ORDER

Before the court is the motion of the Honorable Joe Kendall and the Honorable Jerry Buchmeyer (collectively, "movants") for sanctions against Noemi Collie ("Collie") and Frank Hernandez ("Hernandez") (collectively, "respondents") pursuant to Rule 11 of the Federal Rules of Civil Procedure. For the following reasons, the motion is granted.

I. BACKGROUND

On January 6, 1995, Judge Kendall, United States District Judge for the Northern District of Texas, sanctioned Collie, an attorney who practices in the Northern District of Texas, for violating Rules 11(b)(1) and (b)(3) of the Federal Rules of Civil Procedure by repetitiously asserting essentially the

same claim against the same defendant in multiple lawsuits.[1] Judge Kendall ordered Collie to pay the defendant's costs and attorney's fees. The Fifth Circuit Court of Appeals affirmed the sanctions order. See *Dailey v. Vought Aircraft Company*, 82 F.3d 415 (5th Cir. 1996)(table). Collie, however, failed to timely pay the sanctions. Therefore, on July 18, 1996, Judge Kendall ordered that Collie be barred from practicing in the Northern District until she complied with his order and paid the sanctions. Judge Kendall entered the order of disbarment without giving Collie notice or an opportunity to be heard on the matter.

Collie petitioned Judge Buchmeyer, Chief Judge for the Northern District of Texas, for relief from Judge Kendall's order. *See* N. Dist. Tex. R. 13.2(b).[2] On September 6, 1996, Judge Buchmeyer held an evidentiary hearing on Collie's petition. After considering Collie's explanation of the reasons she had failed to comply with Judge Kendall's orders, Judge Buchmeyer denied Collie's petition. Collie then appealed to the Fifth Circuit.

In a published opinion issued May 12, 1998, the Fifth Circuit held that the actions of Judge Kendall and Judge Buchmeyer deprived Collie of her procedural due process rights guaranteed by the United States Constitution and the Local Rules of the Northern District of Texas. See *Dailey v. Vought Aircraft Company*, 141 F.3d 224, 226 (5th Cir. 1998).

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[1] Collie represented plaintiff Ollie Dailey ("Dailey") before Judge Kendall in three separate lawsuits brought against Dailey's employer, Vought Aircraft Company. See *Dailey v. Vought Aircraft Company*, 141 F.3d 224, 226 (5th Cir. 1998)(describing procedural history of those cases).

[2] In 1996, Local Rule 13.2(b) provided that "[i]f discipline ordered by the court pursuant to this paragraph (b) is in the form of suspension or disbarment from practice in this Court, the affected attorney shall have the right within ten days after the discipline is ordered to petition the Chief Judge of this Court for relief therefrom, in which event the Chief Judge shall have the absolute discretion as to what, if any, further action will be taken by this Court in respect to the matter."

Specifically, the court held that Judge Kendall erred in suspending Collie without notifying her that the failure to timely pay the sanctions constituted grounds for disbarment and without affording her an opportunity to be heard with respect to the disbarment. *Id.* at 230. The court further held that Judge Buchmeyer erred in failing to give Collie sufficient notice and time to prepare for the hearing conducted before him. *Id.* at 231.

On July 20, 1998, the respondents filed the original complaint in this lawsuit, alleging that the movants had used their offices as United States District Judges to "knowingly and intentionally" deprive Collie of her constitutional rights. *See* Plaintiff's Original Complaint and Jury Demand ("Complaint") ¶ 47. Hernandez signed the complaint as "Lead Counsel for Plaintiff;" Collie signed the complaint as "*Pro Se* - Co-Counsel." See *id.* at 13.

On September 18, 1998, the movants filed a motion to dismiss the complaint, arguing that the doctrine of judicial immunity shielded them from any liability for the actions complained of by Collie. On the same day, the movants also filed a motion for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure ("Rule 11").[3] *See* Defendant's Motion for Rule 11 Sanctions and Brief in Support Thereof ("Motion") at 1.

On May 19, 1999, the court granted the movant's motion to dismiss on the ground that Collie's claims were barred by judicial immunity. *See* Memorandum Order dated May 19, 1999. The court now turns to the merits of the motion for

[3] As required by FED. R. CIV. P. 11(c)(1)(A), the movants served a copy of their motion for sanctions on the respondents more than twenty-one days before filing the motion with the court. The respondents, however, failed to withdraw their complaint.

sanctions under Rule 11.[4]

II. ANALYSIS

The purpose of Rule 11 is "to deter baseless filings in district court and thus . . . streamline the administration and procedure of the federal courts." *Cooter & Gell v. Hartmarx Corporation*, 496 U.S. 384, 393 (1990). To achieve this purpose, Rule 11 imposes a duty upon those who file pleadings and motions with the court to base their claims upon factually and legally supportable grounds. See *Cooter & Gell*, 496 U.S. at 393; see also *Federal Deposit Insurance Corporation v. Calhoun*, 34 F.2d 1291, 1296 (5th Cir. 1994). Rule 11 further provides for the punishment of those litigants and attorney's who unreasonably pursue frivolous suits. See *id.*

In their motion for sanctions, the movants argue that the claims asserted in Collie's original complaint are legally frivolous because they are clearly barred by the well-established doctrine of judicial immunity. *See* Motion at 4-5. Thus, the movants argue, the respondents violated Rule 11(b)(2), which requires an attorney who signs a pleading to certify to the court that he or she "has conducted a reasonable inquiry into the law such that the document embodies existing legal principles or a good faith argument 'for the extension,

[4] Collie and Hernandez have both had an opportunity to be heard on the motion for sanctions. Collie filed a response to the motion for sanctions on October 8, 1998. *See* Plaintiff's Response to Defendants' Motion to Dismiss and Motion for Sanctions and Brief in Support Thereof at 19-20. Hernandez responded to the motion for sanctions on June 10, 1999, after being informed by the court that, despite his suspension resulting from his conduct in connection with another case, *Caves v. Lockridge*, No. 3:97-CV-0118-G, he had the right to file a written response to the motion for sanctions either *pro se* or through counsel of his choice. *See* Order of May 19, 1999.

modification, or reversal of existing law.'"[5] *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 874 (5th Cir. 1988)(en banc).

The court has previously determined that the claims asserted in Collie's original complaint are barred by well-established precedent. *See* Memorandum Order of May 19, 1999 at 6-13. The court has also rejected the respondents' arguments that there is any basis for a change in the existing law on judicial immunity, which would allow Collie's claims against the movants. See *id.* In considering the instant motion for sanctions, however, the court has revisited the relevant law on judicial immunity and has reconsidered the respondents' arguments regarding that law. Despite careful review, the court is still of the opinion that the claims asserted in Collie's original complaint are without any basis in existing law and that the respondents have failed to make a colorable, non-frivolous argument for a change in existing law. Because the claims asserted in Collie's original complaint are legally frivolous, the court concludes that the respondents have violated Rule 11(b)(2).

The respondents argue that they have not violated Rule 11 because some of the claims asserted in their complaint raise issues of first impression. Specifically, the respondents point to Collie's *Bivens* claims for declaratory and injunctive relief. Neither the Supreme Court nor the Fifth Circuit has considered whether the immunity of a federal judicial officer extends to such a claim. *See* Memorandum Order of May 19, 1999 at 11. Ordinarily, litigants and attorneys who argue

[5] FED. R. CIV. P. 11(b)(2) states that "[b]y presenting to the court. . . a pleading, . . . an attorney . . . [certifies] that to the best of [his or her] knowledge, information, and belief, formed after a reasonable inquiry under the circumstances, . . . the claims, defenses, and other legal contentions therein are warranted by existing law or by a non frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."

points of first impression are not the recipients of Rule 11 sanctions. However, "a claim that is utterly unsupportable may be sanctionable even if the circuit has not addressed the issue." *United States v. Alexander*, 981 F.2d 250, 253 (5th Cir. 1993).

Here, the respondents' *Bivens* claims for equitable relief are "utterly unsupportable." In the first place, the respondents have not cited, and cannot cite because none exists, a single case supporting their position that, where the plaintiff asserts a *Bivens* claim for equitable relief against a federal judge, the judge can be held liable for judicial actions not performed in the absence of all jurisdiction. Secondly, all the cases which have considered the question have held that federal judges enjoy immunity under *Bivens* suits seeking equitable relief. *See* Memorandum Order of May 19, 1999 at 12-13 (citing *Mullis v. United States Bankruptcy Court for District of Nevada*, 828 F.2d 1385, 1391-94 (9th Cir. 1987), *cert. denied*, 486 U.S. 1040 (1988); *Stephens v. Herring*, 827 F.Supp. 359, 361-65 (E.D. Va. 1993); *Wightman v. Jones*, 809 F.Sup. 474, 476-79 (N.D. Tex. 1992); and *Page v. Grady*, 788 F. Supp. 1207, 1208-13 (N.D. Ga. 1992)). Finally, the arguments asserted by the respondents for overcoming the doctrine of judicial immunity under the circumstances of this case are based on a tortured and irrational reading of unrelated and outdated precedents.

With all the law on the subject going against the respondents, the court concludes that no attorney who made a reasonable inquiry into the law would have advanced the meritless claims and arguments proposed by Collie and Hernandez. The respondents' failure to conduct a reasonable inquiry into the law, or their obstinate refusal to accept the law after making such an inquiry, constitutes a violation of Rule 11(b)(2).

Even if the respondents' legal contentions regarding the federal judge's immunity from *Bivens* suits seeking equitable relief were not legally frivolous, respondents violated Rule 11 by asserting claims for monetary relief. As discussed in this court's memorandum opinion granting the movants' motion to dismiss, Collie's claims for money damages were plainly foreclosed by well-established legal principles and authoritative precedent. *See* Memorandum Order dated May 19, 1999 at 5-11. The fact that the respondents filed a complaint containing such legally frivolous claims is, by itself, sufficient to justify an imposition of sanctions under Rule 11. See *Hale v. Harney*, 786 F.2d 688, 692 (5th Cir. 1986)(upholding sanctions under rule 11 against an attorney for attempting to bring a lawsuit against a state judge in spite of the well-established doctrine of judicial immunity; such a claim "had been legally hopeless for over one hundred years"); see also *Teamsters Local No. 579 v. B&M Transit, Inc.*, 882 F.2d 274, 280-81 (7th Cir. 1989)(holding that district court may impose sanctions against a party even if some of the claims are not frivolous); *Patterson v. Aiken*, 841 F.2d 386, 387 (11th Cir. 1988)("Rule 11 does not prevent the imposition of sanctions where it is shown that the Rule was violated as to a portion of a pleading, even though it was not violated as to other portions.").

Having determined that the respondents violated Rule 11, the court may impose appropriate sanctions. *See* Fed. R. Civ. P. 11(c). The sanctions imposed, however, should be the least severe sanctions that would adequately deter an

attorney from violating Rule 11.[6] See *Merriman v. Security Insurance Company*, 100 F.3d 1187, 1194 (5th Cir. 1996)("[T]he sanction imposed should be the lease severe sanction that adequately furthers the purpose of the Rule."); see also *Thomas*, 836 F.2d at 877-78 (holding that when Rule 11 has been violated, the court should "carefully choose sanctions that foster the appropriate purpose of the rule, depending on the parties, the violation, and the nature of the case").

When warranted, the sanctions imposed may include an order directing payment to the movant of some of all of the reasonable attorney's fees and other expenses incurred as a direct result of the Rule 11 violation. *See* Fed. R. Civ. P. 11(c)(2);[7] see also *Merriman*, 100 F.3d at 1194-95; *Seawright v. Charter Furniture Rental, Inc.*, 39 F.Supp.2d 795, 805 (N.D. Tex. 1999). The court must address four factors in its imposition of monetary sanctions under Rule 11. See *Topalian v. Ehrman*, 3 F.3d 931, 936-37 (5th Cir.

[6] One factor that a court should consider in determining whether Rule 11(b)(2) has been violated is the *pro se* status of the litigant. See *Thomas*, 836 F.2d at 875. The standards applicable to *pro se* litigants are less exacting because such persons are often "severely limited in [their] ability to make effective use of legal materials and apply the law to objective reality." *McCampbell v. KPMG Peat Marwick*, 982 F.Supp. 445, 448 (N.D. Tex. 1997). In this case, Collie signed the original complaint "*pro se.*" Collie, however, is an attorney, licensed by the state of Texas and admitted to practice in the Northern District. She has the ability to make effective use of legal materials. Therefore, it is appropriate for the court to treat her as an attorney and to hold her accountable to the more demanding standards applicable to attorneys.

[7] Hernandez argues that monetary sanctions for a violation of the Rule 11(b)(2) cannot be imposed against Collie because she was represented by an attorney -- Hernandez himself -- in the underlying lawsuit. *See* Response and Brief of Frank P. Hernandez, Esq. to Defendant's [sic] Motion for Rule 11 Sanctions at 1-2. Indeed, Rule 11(c)(2)(A) provides that "[m]onetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2)." The movants, however, do not seek monetary sanctions against Collie as a mere litigant. Rather, they seek sanctions against Collie in her capacity as an attorney who signed the complaint as "co-counsel." *See* Motion at 1; Defendants' Reply to Response by Attorney Frank Hernandez to Defendants' Motion for Rule 11 Sanctions at 1. The court may impose monetary sanctions for a violation of Rule 11(b)(2) against Collie in a such capacity.

1993); *Taylor v. County of Copiah*, 937 F.Supp. 580, 584 (S.D. Miss. 1995). First, the court "must announce the sanctionable conduct giving rise to its order." *Topalian*, 3 F.3d at 937. As discussed above, the respondents violated Rule 11(b)(2) by asserting claims that were completely foreclosed by well-established law and that were not warranted by a good faith argument for an extension, modification, or reversal of existing law.

Second, the court must address the connection between the monetary sanctions the court imposes and the sanctionable conduct. *Topalian*, 3 F.3d at 937; *Seawright*, 39 F.Supp.2d at 806. As stated above, the respondents filed a totally meritless lawsuit. Thus, every dollar of attorney's fees the movants incurred themselves was a dollar "wasted." See *Seawright*, 39 F.Supp.2d at 807.

Third, the court must review whether the costs or expenses were "reasonable," as opposed to self-imposed, mitigable, or the result of delay in seeking court intervention. *Topalian*, 3 F.3d at 937; *Seawright*, 39 F.Supp.2d at 807. In this case, the movants alerted the respondents early on that Collie's were legally unfounded.[8] See *Childs v. State Farm Mutual Automobile Insurance Company*, 29 F.3d 1018, 1028 (5th Cir. 1994)(holding that one factor in determining whether attorneys' fees were "reasonable" is whether the party seeking sanctions promptly notified the offending party and the court of the violation). By filing their motion for sanctions contemporaneously with their motion to dismiss, the movants promptly put Collie and Hernandez on notice

[8] The respondents were also warned by Judge Fitzwater of this court, in a memorandum opinion and order denying their motion to transfer, that it was "highly probable that[the movants] will be found to be entitled to absolute judicial immunity from suit" and that it was "difficult to envision a circumstance in which this case is not destined to be dismissed on [the basis of judicial immunity]." *See* Memorandum Opinion and Order dated October 8, 1998 at 6.

that they would seek sanctions for having to defend this frivolous suit. Despite such notice, the respondents refused to withdraw the complaint. Thus, the court finds that the amount of attorneys' fees incurred by the movants in this case is directly attributable to the respondents' obdurate refusal to acknowledge the futility of the claims asserted in the original complaint. The court further finds that none of the actions taken by the movants in the defense of this lawsuit was unnecessary. Stated another way, it was reasonable for the movants to do all the things they did to defend themselves against Collie's claims.

Finally, the court must consider whether the sanction imposed is the least severe sanction adequate to achieve the purpose of Rule 11. See *Topalian*, 3 F.3d at 937. In addition to attorneys' fees, appropriate sanctions might include an admonishment or reprimand or requiring some form of legal education. See *Thomas*, 836 F.2d at 877-78 (holding that, where appropriate, sanctions should be "educational and rehabilitative" in character). Both Collie and Hernandez have been sanctioned before by judges in the Northern District of Texas.[9] These previous sanctions did not discourage the respondents from filing the frivolous complaint in the underlying lawsuit. The court thus concludes that an admonishment or reprimand would be futile and would not accomplish the objectives of Rule 11. Furthermore, the court finds, from the respondents' briefs, that Collie and Hernandez are familiar with Rule 11 and with the doctrine of judicial immunity. Thus, the court concludes that requiring the respondents to attend a legal education course would not accomplish the objectives of Rule 11. As already discussed, the legally baseless lawsuit forced the movants to needlessly

[9] Collie has been sanctioned by Judge Kendall for violating Rule 11, and Hernandez has been suspended from practicing before this court until further order. *See* Memorandum Order of May 19, 1999 at 2 (referring to Collie's previous sanctions); Order of May 19, 1999 (referring to Hernandez's previous sanctions).

incur attorney's fees in order to defend themselves. Therefore, after carefully considering other available sanctions, the court concludes that a monetary sanction is appropriate and is the lease severe sanction adequate to achieve the purposes of Rule 11.

III. CONCLUSION

In summary, the court has determined that the claims asserted by Collie and Hernandez in the original complaint were legally frivolous and that the respondents violated Rule 11 by filing said complaint. Therefore, as a sanction, Collie and Hernandez should pay the attorneys' fees reasonably incurred by the movants in responding to the original complaint.[10]

The movants shall submit by affidavit or declaration (1) a statement of the hours spent by their counsel after the respondents refused to withdraw their complaint, together with a detailed description, by date, of the services performed by counsel; (2) counsel's opinion, if any, concerning what hourly fee is reasonable under the circumstances; and (3) a statement of any other expenses the movants reasonably incurred as a result of the respondents' Rule 11 violation. If the respondents wish to contest the movants' submission, they shall do so within the normal twenty days for responding to civil motions allowed by Local Civil Rule 7.1(e). Movants may then reply within fifteen days.

[10] In this case, the movants have been represented by attorneys with the United States Department of Justice without charge. Thus, the attorney's fees in this case have been incurred by the Department of Justice and the sanctions awarded today will be payable to the Department t of Justice.

SO ORDERED.

July 6, 1999.

/S/ _____

A. JOE FISH
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NOEMI A. COLLIE,	*	
	*	
Plaintiff,	*	
	*	
VS.	*	CIVIL ACTION NO.
	*	3:98-CV-1678-G
JOE KENDALL, and	*	
JERRY BUCHMEYER,	*	
	*	
Defendants.	*	

ORDER AWARDING RULE 11 SANCTIONS

On July 6, 1999, this Court entered a Memorandum Order granting the motion of the defendants in this case for Rule 11 sanctions. As sanctions, the court held that the Rule 11 respondents, Noemi Collie and Frank Hernandez, should pay the attorney's fees reasonably incurred by the movants in responding to the original complaint. The court further noted that because movants, who are United States District Judges, are represented in this matter without charge by attorneys from the United States Department of Justice, sanctions would be payable to the United States Department of Justice. In compliance with the July 6 order, movants filed on July 23, 1999, an application for attorney's fees in which they submitted the following information requested by the court.

1. Counsel for movants had expended, through July 23, 1999, a total of at lease 79.4 hours working on this case. According to movants, the deadline under Rule 11 for

respondents to withdraw their complaint expired on September 17, 1998. Thereafter, counsel for movants expended a total of 23.4 hours working on the case, as detailed in the declaration of AUSA Phillip C. Umphres appended to the movant's application.

2. Counsel for movants advocated an hourly rate for counsel's services of $118.68 per hour as a reasonable rate for said work for the reasons set forth in the application.

3. Counsel for movant advised that no other expenses had been incurred to date; however, given that plaintiff Collie has filed a notice of appeal of the judgment of this court dismissing the lawsuit in this case, movants' counsel expects to incur additional expenses in the future as a result of responding to her appeal of the order dismissing her complaint in this case as well as any appeal that may be taken of the award of Rule 11 sanctions.

Despite the express invitation of the court, respondents have not filed any contest to the movants' submission and the deadline for doing so under Local Rule 7.1(e) has now expired. Accordingly, the court makes the following findings and enters the following order of sanctions.

The court FINDS that each and every hour of time expended by counsel for the Rule 11 movants from September 18, 1998 through July 23, 1999 was a reasonable and necessary expense incurred by movants in responding to the complaint filed in this case, including pursuit of movants' request for Rule 11 sanctions. The court further **FINDS** that the requested reimbursement rate of $118.68 per hour is a fair and reasonable hourly rate for compensation of movant's counsel. That rate is well within below the maximum hourly rates charged by private counsel in the Dallas, Texas area who

have similar skill and experience levels as counsel for the movants.

The court **ORDERS** that, as Rule 11 sanctions in this case, respondents Noemi Collie and Frank Hernandez shall pay the sum of $2,777.11 to the United States Department of Justice for the value of attorney's fees incurred to date by movants' counsel. The liability of Collie and Hernandez for said sanctions shall be joint and several.

In order to insure that Respondents receive proper credit for the payment, when made, the court further **ORDERS** that payment shall be made by delivery of a check for the amount of the sanctions to the Office of the United States Attorney for the Northern District of Texas, Dallas, Texas, attn: AUSA Phillip C. Umphres.

The court further **ORDERS** that the sanctions shall be paid, in full, no later than 15 calendar days after the date that this order, unless an appeal is taken of this order of sanctions. In the event an appeal is taken of this order of sanctions, the sanctions shall be paid no later than 15 days after the date on which all appeals of this order are finally resolved.

The court declines at this time to award in advance sanctions for any additional costs or attorneys fees that may be incurred by movants in the future as a result of any appeal that may be made by respondents of either the order dismissing the complaint in this case or the awarding of Rule 11 sanctions. However, should an appeal of either order be pursued by Collie or Hernandez, respondents may submit a supplemental application to this court for additional monetary sanctions based on any additional attorneys fees or costs that may be incurred in the future.

Signed this 24th day of August, 1999.

/S/ _____

A. JOE FISH
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 97-11255
Summary Calendar

CLAYTON BRYANT CAVES,
Plaintiff-Appellant,

FRANK P. HERNANDEZ,
Appellant,

VS.

OFFICE MARK LOCKRIDGE,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(3:97-CV-118-G)

Before KING, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:[1]

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[1] Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

This appeal concerns sanctions resulting in the dismissal of Caves' action and the suspension of his counsel. "We review the district court's imposition of sanctions and dismissal of Plaintiff's case for abuse of discretion." *Gonzalez v. Trinity Marine Group, Inc.*, 117 F.3d 894, 897 (5th Cir. 1997)(citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 55 (1991)).

Clayton Bryant Caves appeals the district court's dismissal, pursuant to Fed. R. Civ. P. 16(f), of his civil rights action for failure to timely file a joint status report. Because the limitations period will bar reprosecution of at least some of Caves' claims, the dismissal is tantamount to a dismissal with prejudice. *See Berry v. CIGNA/RSI-CIGNA*, 975 F.2d 1188, 1191 (5th Cir. 1992); *Henson-El v. Rogers*, 923 F.2d 51, 52 (5th Cir.), *cert. denied*, 501 U.S. 1235 (1991); Tex. Civ. Prac. & Rem. Code Ann. Sec. 16.003 (West 1991). The district court did not consider alternatives to the dismissal; accordingly, the district court's order is VACATED, and the case is REMANDED for the district court to determine whether a lesser sanction would serve the interests of justice. *See Bann v. Ingram Micro, Inc.*, 108 F.3d 625, 627 (5th Cir. 1997); *SEC V. First Houston Capital Resources Fund, Inc.*, 979 F.2d 380, 381-82 (5th Cir. 1992).

Frank P. Hernandez, counsel for Caves, appeals the district court's order, pursuant to N.D. Tex. R. 83.8(b)(2), (4), suspending him, until further order, from practice before the court for failure to show cause why he should not be held in contempt or otherwise sanctioned. Based upon our review of the record, we hold that the district court did not abuse its discretion in suspending Hernandez until further order. Accordingly, the order of the district court is AFFIRMED.

Hernandez also challenges N.D. Tex. R. 83.8(a) as unconstitutional. He was not suspended pursuant to that subsection of N.D. Tex. R. 83.8. This court has no jurisdiction to consider this contention, because Hernandez has not presented a justiciable controversy. *See Middle South Energy, Inc. v. City of New Orleans*, 800 F.2d 488, 490 (5th Cir. 1986).

AFFIRMED in part; VACATED and REMANDED in part.